

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BNSF RAILWAY COMPANY,

Plaintiff,

V.

No. 3:18-cv-05926

CLARK COUNTY, WASHINGTON; MITCH NICKOLDS, in his official capacity as Director of Community Development of Clark County; KEVIN A. PRIDEMORE, in his official capacity as Code Enforcement Coordinator of Clark County; and RICHARD DAVIUAU, in his official capacity as County Planner of Clark County,

CLARK COUNTY DEFENDANTS'
ANSWER AND AFFIRMATIVE
DEFENSES

Defendants.

Unless specifically admitted herein, Defendants deny each and every allegation in Plaintiff's Complaint.

1. INTRODUCTION

Defendants deny the allegations contained in Plaintiff's "Introduction," as they consist of improper argument and legal conclusions. Moreover, Defendants are without knowledge as to the truth of the factual allegations contained in the Introduction because Plaintiff has not yet applied for a National Scenic Area Permit that would supply information regarding its project.

CLARK COUNTY DEFENDANTS'
ANSWER AND AFFIRMATIVE DEFENSES - 1 of 8

CLARK COUNTY PROSECUTING ATTORNEY
CIVIL DIVISION
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II. PARTIES

1. Defendants admit the allegations contained in Paragraph 1 of Plaintiff's Complaint.
2. With regard to the allegations in Paragraph 2 of Plaintiff's Complaint, Defendants admit that Clark County, Washington, is a municipal corporation formed and operating under the laws of the State of Washington.

3. Defendants admit the allegations contained in Paragraph 3 of Plaintiff's Complaint.

4. Defendants admit the allegations in Paragraph 4 of Plaintiff's Complaint.

5. Defendants admit the allegations in Paragraph 5 of Plaintiff's Complaint.

III. JURISDICTION

6. Defendants deny the jurisdictional conclusions and allegations contained in Paragraph 6 of Plaintiff's Complaint.

7. Defendants deny the jurisdictional conclusions and allegations contained in Paragraph 7 of Plaintiff's Complaint.

8. Defendants deny the jurisdictional conclusions and allegations contained in Paragraph 8 of Plaintiff's Complaint.

9. Defendants deny the jurisdictional conclusions and allegations contained in Paragraph 9 of Plaintiff's Complaint.

IV. VENUE AND INTRADISTRICT ASSIGNMENT

10. Subject to, and without waiving any jurisdictional defenses, Defendants admit the allegations contained in Paragraph 10 of Plaintiff's Complaint.

1 11. Subject to, and without waiving any jurisdictional defenses, Defendants admit the
2 allegations contained in Paragraph 11 of Plaintiff's Complaint.

3 **V. STATUTORY AND REGULATORY BACKGROUND**

4 **A. ICCTA**

5 12. Defendants deny the allegations contained in Paragraph 12 of Plaintiff's
6 Complaint because they consist of improper argument and legal conclusions.

7 13. Defendants deny the allegations contained in Paragraph 13 of Plaintiff's
8 Complaint because they consist of improper argument and legal conclusions.

9 14. Defendants deny the allegations contained in Paragraph 14 of Plaintiff's
10 Complaint because they consist of improper argument and legal conclusions.

11 **B. The Columbia River Gorge Compact**

12 15. Defendants deny the allegations contained in Paragraph 15 of Plaintiff's
13 Complaint because they consist of improper argument and legal conclusions.

14 16. Defendants deny the allegations contained in Paragraph 16 of Plaintiff's
15 Complaint because they consist of improper argument and legal conclusions.

16 17. Defendants deny the allegations contained in Paragraph 17 of Plaintiff's
17 Complaint because they consist of improper argument and legal conclusions.

18 **C. Clark County Unified Development Code**

19 18. Defendants admit the allegations contained in Paragraph 18 of Plaintiff's
20 Complaint.

21 19. With regard to the allegation contained in Paragraph 19 of Plaintiff's Complaint,
22 Defendants admit that, pursuant to the Columbia Gorge National Scenic Area Act, it has enacted

1 land use ordinances, codified as Clark County Code 40.420, for the National Scenic Area located
2 in Clark County.

3 20. Defendants deny the allegations contained in Paragraph 20 of Plaintiff's
4 Complaint because they consist of improper argument and legal conclusions.

5 21. Defendants admit the allegations contained in Paragraph 21 of Plaintiff's
6 Complaint.

7 **VI. STATEMENT OF FACTS**

8 22. Defendants are without information or belief sufficient to admit or deny the
9 allegations contained in Paragraph 22 of Plaintiff's Complaint and, therefore, denies the same.

10 23. Defendants are without information or belief sufficient to admit or deny the
11 allegations contained in Paragraph 23 of Plaintiff's Complaint and, therefore, denies the same.

12 24. Defendants are without information or belief sufficient to admit or deny the
13 allegations contained in Paragraph 24 of Plaintiff's Complaint and, therefore, denies the same.

14 25. Defendants are without information or belief sufficient to admit or deny the
15 allegations contained in Paragraph 25 of Plaintiff's Complaint and, therefore, denies the same.

16 26. Defendants are without information or belief sufficient to admit or deny the
17 allegations contained in Paragraph 26 of Plaintiff's Complaint and, therefore, denies the same.

18 27. Defendants are without information or belief sufficient to admit or deny the
19 allegations contained in Paragraph 27 of Plaintiff's Complaint and, therefore, denies the same.

20 28. Defendants deny the allegations contained in Paragraph 28 of Plaintiff's
21 Complaint because they consist of improper argument and legal conclusions.

22 29. Defendants admit that Defendant Daviau advised BNSF that a National Scenic
23 Area Permit was required for BNSF's project in the Columbia River Gorge National Scenic

1 Area. Defendants deny the remaining allegations contained in Paragraph 29 of Plaintiff's
2 Complaint because they consist of improper argument and legal conclusions.

3 30. Defendants admit that, with regard to the allegation contained in Paragraph 30 of
4 Plaintiff's Complaint, on or about September 20, 2018, Defendant Pridemore informed BNSF
5 that it was required to obtain a National Scenic Area Permit for its project in the Columbia River
6 Gorge National Scenic Area.

7 31. Defendants admit the allegations contained in Paragraph 31 of Plaintiff's
8 Complaint.

9 32. Defendants admit the allegations contained in Paragraph 32 of Plaintiff's
10 Complaint.

11 **VII. NECESSITY FOR DECLARATORY AND INJUNCTIVE RELIEF**

12 33. Defendants deny the allegations contained in Paragraph 33 of Plaintiff's
13 Complaint because they consist of improper argument and legal conclusions.

14 34. Defendants deny the allegations contained in Paragraph 34 of Plaintiff's
15 Complaint because they consist of improper argument and legal conclusions.

16 35. Defendants deny the allegations contained in Paragraph 35 of Plaintiff's
17 Complaint because they consist of improper argument and legal conclusions.

18 36. Defendants deny the allegations contained in Paragraph 36 of Plaintiff's
19 Complaint because they consist of improper argument and legal conclusions.

20 **VIII. CAUSE OF ACTION – ICCTA Preemption**

21 37. Defendants incorporate their responses to the foregoing paragraphs as if fully set
22 forth herein.

1 38. Defendants deny the allegations contained in Paragraph 38 of Plaintiff's
2 Complaint.

3 **IX. AFFIRMATIVE DEFENSES**

4 By way of Further Answer, Defendants allege the following Affirmative Defenses:
5

6 **FIRST AFFIRMATIVE DEFENSE**
7 (Lack of Subject Matter Jurisdiction)

8 39. This Court lacks subject matter jurisdiction over this case.
9

10 **SECOND AFFIRMATIVE DEFENSE**
11 (Failure to State a Claim)

12 40. Plaintiff has failed to state a claim upon which relief may be granted.
13

14 **THIRD AFFIRMATIVE DEFENSE**
15 (Failure to Exhaust Administrative Remedies)

16 41. Plaintiff has failed to exhaust its administrative remedies.
17

18 **FOURTH AFFIRMATIVE DEFENSE**
19 (Estoppel)

20 42. Plaintiff's claims are barred by the doctrine of equitable estoppel.
21

22 **FIFTH AFFIRMATIVE DEFENSE**
23 (Waiver)

24 43. Plaintiff's claims are barred by the doctrine of waiver.
25

26 **SIXTH AFFIRMATIVE DEFENSE**
27 (Primary Jurisdiction)

28 44. Plaintiff's claims are barred by the doctrine of primary jurisdiction.
29

30 **IX. RELIEF REQUESTED**

31 WHEREFORE, County Defendants have fully answered Plaintiff's Complaint and,
32
33 having set forth its defenses, pray for relief as follows:
34

1. For dismissal of the Complaint with prejudice;
2. Such further relief as may be just and proper.

3 Dated this 5th day of December, 2018.

5 s/ Taylor Hallvik

6 Taylor Hallvik, WSBA #44963
7 Deputy Prosecuting Attorney
8 Clark County Prosecutor's Office
9 Civil Division
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11 Vancouver WA 98666-5000
12 Tele: (564) 397-2478
13 Email: taylor.hallvik@clark.wa.gov

14 *Attorney for Defendants*

15 CERTIFICATE OF SERVICE

16 I hereby certify that on this 5th day of December, 2018, I electronically filed the
17 foregoing *Clark County Defendants' Answer and Affirmative Defenses* with the Clerk of the
18 Court using the CM/ECF system, which will send notification to the following:

19 *Attorneys for Plaintiff:*

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30 DATED this 5th day of December, 2018.

31 s/ Thelma Kremer
32 Thelma Kremer, Legal Secretary